

AUG 4 1979

MICHAEL RODAY, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. [REDACTED]

78-1887

WILLIAM MAULDIN SMITH,*Petitioner,*

vs.

**ATTORNEY REGISTRATION and DISCIPLINARY COM-
MISSION OF THE SUPREME COURT OF ILLINOIS,***Respondent.*

Petition For Writ Of Certiorari To
The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF**FREDERICK F. COHN**

35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692

Attorney for Petitioner

TABLE OF CONTENTS

	PAGE
POINT I:	
Where Petitioner, An Attorney, Is Denied Effective Assistance Of Counsel At The Adversary Hearing That Resulted In His Disbarment, He Has Been Denied "Due Process" Of Law	1
POINT II:	
The Illinois "Attorney Disciplinary Proceeding" That Requires A Lawyer To Present Any Mitigation Evidence Prior To A Determination Of Whether He Acted Unethically Or Forego Presenting Mitigation Evidence Violates Due Process	3
CONCLUSION	4

LIST OF AUTHORITIES

Frank v. Maryland, 359 U.S. 360, 3 L.Ed. 2d 877 (1959)	2
Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed. 2d 656 (1973)	2
In Re Ruffalo, 390 U.S. 544 (1968)	1, 2
McMann v. Richardson, 397 U.S. 759, 25 L.Ed. 2d 763 (1970)	2
Ill. Rev. Stats., Chap. 110A (Sec. 770, Rules 1-1 through 10-7)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1187

WILLIAM MAULDIN SMITH,

Petitioner,

vs.

**ATTORNEY REGISTRATION and DISCIPLINARY COM-
MISSION OF THE SUPREME COURT OF ILLINOIS,**

Respondent.

**Petition For Writ Of Certiorari To
The Supreme Court Of Illinois**

PETITIONER'S REPLY BRIEF

I.

WHERE PETITIONER, AN ATTORNEY, IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE ADVERSARY HEARING THAT RESULTED IN HIS DISBARMENT, HE HAS BEEN DENIED "DUE PROCESS" OF LAW.

Respondent, relying on *In Re Ruffalo*, 390 U.S. 544 (1968), asserts that "Attorney disciplinary proceedings are deemed to be free of any due process defects so far

as procedure is concerned if the basic requirements of notice and hearings are met." Reliance on *In Re Ruffalo* is misplaced. There the court was not asked to and did not consider whether an attorney at a disciplinary proceeding has a due process right to counsel.

Reliance on the proposition that disciplinary proceedings are "not to decide criminality of a person's act, but rather to determine the moral fitness of an attorney to continue practice of law" does not resolve the issue of whether the attorney has a due process right to counsel. Where the proceedings are *adversary* and the State is represented by counsel, due process requires that a respondent have counsel. See *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656 (1973). And the right to counsel must mean the right of effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763 (1970).

Respondent asserts that because there is no case specifically so holding, there is no right to effective assistance of counsel fashioned by the Due Process Clause of the Constitution. This narrow view of a stagnant Due Process Clause has been frequently rejected by the court.

In *Frank v. Maryland*, 359 U.S. 360, 371, 3 L.Ed. 2d 877 (1959), the Court stated:

"[w]hat free people have found consistent with their enjoyment of freedom for centuries . . . does not freeze due process within the confines of historical facts . . . 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.' *Wolf v. Colorado*, 338 U.S. 25, 27 . . ."

Respondent has neither asserted nor demonstrated that the petitioner's representation below satisfied a due process standard of effective assistance of counsel.

Respondent has not so asserted because it is self evident that the representation afforded petitioner was so abysmally poor as to be no representation at all.

II.

THE ILLINOIS ATTORNEY DISCIPLINARY PROCEEDING THAT REQUIRES A LAWYER TO PRESENT ANY MITIGATION EVIDENCE PRIOR TO A DETERMINATION OF WHETHER HE ACTED UNETHICALLY OR FOREGO PRESENTING MITIGATION EVIDENCE VIOLATES DUE PROCESS.

The State's "compelling interest in the practice of the legal profession" and the State Supreme Court's "inherent power to discipline attorneys" does not provide an exemption for the disciplinary procedures from the Due Process provisions of the United States Constitution.

Although attorney disciplinary proceedings are original proceedings in the Illinois Supreme Court, a respondent in such proceedings, if he has matters in mitigation affecting the amount or type of discipline to be imposed, must present such evidence before the hearing panel. Ill. Rev. Stats., Chap. 110A, (Sec. 770, Rules 1-1 through 10-7). The Illinois Supreme Court, when making its final determination, acts as a reviewing court. Although the recommendations of the hearing panel need not be followed by the court, there is not a procedure to present evidence directly to the Illinois Supreme Court.

Under the Illinois procedure an attorney must choose between presenting mitigation evidence prior to a determination of "guilt," or not at all. The Illinois procedure violates Due Process.

CONCLUSION

As suggested by Honorable Chief Justice Warren Burger, there exists more emphasis on regulation and discipline of attorneys. Although such regulation is desirous, such "disciplinary procedure" must satisfy due process. Certiorari should be granted so that this court can set due process guidelines for the State courts.

For the foregoing reasons certiorari should be allowed to review the decision of the Illinois Supreme Court.

Respectfully submitted,

FREDERICK F. COHN

35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692

Attorney for Petitioner